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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Carriage of Digital Television Broadcast )  
Signals )  
)  
Amendments to Part 76 of the Commission's )  
Rules )  
)  
Implementation of the Satellite Home Viewer )  
Improvement Act of 1999 )  
)  
Local Broadcast Signal Carriage Issues )  
)  
Application of Network Non-Duplication, )  
Syndicated Exclusivity and Sports Blackout )  
Rules to Satellite Retransmission of Broadcast )  
Signals )

CS Docket No. 98-120

CS Docket No. 00-96

CS Docket No. 00-2

To: The Commission

**SUPPLEMENTAL COMMENTS OF  
GEMSTAR-TV GUIDE INTERNATIONAL, INC. TO PETITION FOR  
CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION**

Gemstar-TV Guide International, Inc. ("Gemstar"), having filed a Petition for Clarification or, in the Alternative, Reconsideration, in the above-captioned dockets (April 25, 2001),<sup>1</sup> submits these supplemental comments in light of recent developments concerning "program-related" broadcast material. Specifically, the recent determination of the meaning of "program-related" in a *Memorandum Opinion and Order*, allowing Time Warner to strip out

<sup>1</sup> See Petition of Gemstar-TV Guide International for Clarification or, in the Alternative, Reconsideration in CS Docket Nos. 98-120, 00-96 & 00-2 (Apr. 25, 2001) ("Petition"). Gemstar is filing these comments because of recent developments that substantially bear on the issues raised in the reconsideration phase of this proceeding and respectfully requests that the Commission accept them as such. Should the Commission decline to do so, Gemstar respectfully requests that they be included in the record for this proceeding as a written *ex parte* submission.

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Gemstar's electronic program guide ("EPG") material from the local broadcast signals carried on Time Warner systems, is relevant to consideration of Gemstar's Petition.<sup>2</sup> In its Petition, Gemstar urged the Commission: (1) to clarify that the *First Report and Order* in the DTV must carry proceeding<sup>3</sup> neither prematurely decided that the analog test for determining the "program-relatedness" of material transmitted in broadcast signals would be imported to the digital environment nor selectively applied the analog test to determine that digitally delivered EPG information is not program-related;<sup>4</sup> and (2) if the Commission has tentatively decided to use the analog test in the digital context, to reconsider that decision pending resolution of program-relatedness questions in the *Digital Must Carry Further Notice*.<sup>5</sup>

The application of the analog program-related standard in the *MO&O*, which has the effect of frustrating the only alternative EPG delivery-mechanism that exists, underscores the urgency of Gemstar's Petition.<sup>6</sup> Application of that standard to innovative technology (albeit,

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<sup>2</sup> See *In re Gemstar International Group, Ltd. and Gemstar Development Corp., Petition for Special Relief; Time Warner Cable, Petition for Declaratory Ruling*, CSR 5528-Z and CSR 5698-Z, Memorandum Opinion and Order (rel. Dec. 6, 2001) ("*MO&O*").

<sup>3</sup> See *In re Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule [sic] Rulemaking, 16 FCC Rcd 2598 (2001) ("*Digital Must Carry Order*" and "*Digital Must Carry Further Notice*"). The *Digital Must Carry Order* stated that the Commission would "continue to use the same factors enumerated in *WGN*, that are used in the analog context to determine what material is considered program-related." *Digital Must Carry Order* at 2624. However, the *Digital Must Carry Further Notice*, in seeking comment on what the definition of program-related should be, suggests that the Commission has not actually decided to use *WGN* in the digital context.

<sup>4</sup> See Petition at 1-2. As discussed below, the Commission recognized that its approach to program-relatedness in the *MO&O* could not be transported to digital when it reached the correct conclusion that how to define "program-related material" in digital was "a distinct question from . . . [address]ing the analog technology used by Gemstar for its EPG." *MO&O* ¶5.

<sup>5</sup> See Petition at 9. The Petition also requested that the Commission clarify more generally that in the *Digital Must Carry Order* it did not intend to exclude PSIP-delivered or EPG supporting information from digital cable carriage. See *id.*

<sup>6</sup> See *MO&O* ¶¶9-26.

analog technology) was narrowly, and Gemstar believes excessively,<sup>7</sup> confined to the particular facts of the Seventh Circuit's decision in the 1982 copyright case *WGN Continental Broadcasting Co. v. United Video Inc.*<sup>8</sup>

The *MO&O* demonstrates that the *WGN* test as applied is not flexible enough to accommodate advanced analog technologies in a way that ensures consumer access to program-related material and is even less appropriate for determining what kinds of data should be entitled to cable carriage in the digital context. As explained in Gemstar's Petition, digital data that relate to a particular television program and that together constitute a single component can be transmitted opportunistically at times when the video programming is less bandwidth-intensive.<sup>9</sup> The information is then reconstructed in the receiver, such as a digital television set or set-top box, in a way that is transparent to the viewer. This allows broadcasters to take advantage of the increased memory and data processing capability of digital television equipment to download information into the receiver at one time to be accessed at a later time. Under the view adopted by the *MO&O*, *WGN* is unable to accommodate this mode of transmission, leading Gemstar to conclude that application of the *WGN* test to digitally delivered program-related material will run counter to the statutory objectives of the must carry requirement.<sup>10</sup>

Chairman Powell has repeatedly indicated that regulatory classifications ought to be based on how consumers experience a service, not on how the technology works.<sup>11</sup> Before it

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<sup>7</sup> See Petition for Reconsideration of Gemstar in CSR 5528-Z and CSR 5698-Z (Jan. 7, 2002).

<sup>8</sup> 693 F.2d 622 (7th Cir. 1982) ("*WGN*").

<sup>9</sup> See Petition at 7-8.

<sup>10</sup> See, e.g., *MO&O* ¶15; S. Rep. No. 102-92, at 39 (1991) (explaining that one of Congress's goals is to make television service available "to all people of the United States"); see *id.* at 41 (explaining that one reason for the must carry rules is to prevent cable operators from refusing to pass through local broadcast content to consumers).

<sup>11</sup> See, e.g., Remarks of Chairman Michael K. Powell at the National Summit on Broadband Deployment, Washington, D.C., 2001 FCC LEXIS 5832 (Oct. 25, 2001) ("I think broadband (continued...)

was clear how narrowly the Commission was going to interpret *WGN*, Gemstar advocated for an application of that test to both analog and digital technologies that would turn on broadcaster intent and viewer experience rather than on the technical details of transmission. The *MO&O* makes clear that the *WGN* test will not be applied in this way and is inconsistent with the Chairman's vision of a common-sense regulatory scheme. Therefore, it is particularly important for the FCC to clarify that it has not already decided to rely on the *WGN* test to determine program-relatedness in the digital context or, if it has so decided, to reconsider that determination.<sup>12</sup>

### **The *WGN* Test**

When the Commission was directed by Congress to adopt analog must carry rules, it decided that the factors enumerated in *WGN* provided a useful framework for evaluating what constitutes program-related material entitled to mandatory carriage under the statute.<sup>13</sup> According to the *WGN* factors, material is program-related if it "is intended to be seen by the same viewers as are watching [the main program], during the same interval of time in which that

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should be viewed holistically as a technical capability that can be matched to consumers' broad communication, entertainment, information, and commercial desires.").

<sup>12</sup> Although the Petition framed the relief requested as a clarification, Gemstar notes that alternatively, the Commission could decline to address the question on reconsideration and instead simply establish a new program-relatedness standard in the context of the *Digital Must Carry Further Notice*, where it is considering how to define what material is program-related in the digital context. Accordingly, the FCC could achieve the same result by merely proceeding in the *Further Notice* as though the Commission had not predetermined in the *Digital Must Carry Order* that the *WGN* factors should apply in the digital, as well as the analog, world.

<sup>13</sup> See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates; Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market*, Report and Order, 8 FCC Rcd 2965, 2986 (1993) ("*Analog Must Carry Order*").

[program] is broadcast, and as an integral part of [that] program.”<sup>14</sup> At the same time, the Commission recognized that “[c]arriage of information on a station’s [vertical blanking interval (“VBI”)] is rapidly evolving” so that “no hard and fast definition can now be developed”<sup>15</sup> and that there could be situations in which material that did not fall directly within the *WGN* factors could be program-related.<sup>16</sup>

The *MO&O* demonstrates that applying *WGN* in the digital context would be folly. As an initial matter, “[t]he purpose of the *WGN* test is to determine whether material being broadcast *in the VBI* is program-related,”<sup>17</sup> and, of course, as the Commission recognized in the digital carriage proceeding, there is no VBI in digital.<sup>18</sup> But more fundamentally, the *WGN* test that emerges from the *MO&O* is static and time-bound. Despite the Commission’s stated commitment to applying the *WGN* standard flexibly and to considering other factors outside of the test, as discussed below, the *MO&O* resorted exclusively to the *WGN* prongs and applied them woodenly to an innovative analog technology. This interpretation of *WGN* compromises viewers’ access to advanced analog technologies and should not be visited on evolving digital technologies.

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<sup>14</sup> *WGN*, 693 F.2d at 626. The *WGN* court applied the test to determine that teletext transmitted in *WGN*’s VBI containing a future programming guide and local news that supplemented the national news on the main channel was program-related. Thus, when the *WGN* court articulated its program-related standard in 1982, it was tied to the analog technology that *WGN* relied on to transmit the teletext, which like analog content generally was transmitted in a continuous stream.

<sup>15</sup> *Analog Must Carry Order*, 8 FCC Rcd at 2986.

<sup>16</sup> See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6734 (1994) (“*Analog Must Carry MO&O*”) (“[T]he factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness.”). Thus, the Commission read into the statute an intent to interpret program-relatedness dynamically in light of changing technology. Such an interpretation is particularly appropriate in the case of digital television, since Congress explicitly expressed its intent that the Commission adapt the must carry rules to accommodate changes in technology so that the must carry statute would account for the evolution of television services over time. See 47 U.S.C. § 534(b)(4)(B).

<sup>17</sup> *MO&O* ¶15 (emphasis added).

<sup>18</sup> *Digital Must Carry Order*, 16 FCC Rcd at 2625.

**1. The broadcaster intends for the same viewers to watch the main program and the related material**

The first prong of *WGN* asks whether the supplemental information is intended to be seen by the same viewers who are watching the main program. In the *MO&O*, the Commission concluded that broadcasters that “merely pass-through” information “without consideration of their programming schedule” do not have the requisite intent.<sup>19</sup> This formulation is ill-suited to the digital environment because, as the Commission has recognized in the context of interactive television, information related to a program need not be transmitted with the program.<sup>20</sup> Narrowly applying the first prong of *WGN* in the digital context to require that program-related information be transmitted simultaneously with the related programming, rather than simply be available to the viewer in the same time frame, would mean, for example, that the interactive enhancements needed to interact with a high definition sporting event would have to be sent with the event itself, even though it might be more spectrally efficient to send it at another time. Such an inflexible standard would compromise the enhancements made possible by digital technology, which include not only interactive games, but also multiple camera angles, isolation views, and statistical and analytical information for sports broadcasts; localized news broadcasts; 24-hour localized weather; and foreign language versions of programming.

**2. The broadcaster intends for viewers to be able to watch the main program and the related material in the same period of time**

With respect to the second *WGN* factor, whether the material is available during the same interval of time as the main program, the *MO&O* applied *WGN* to conclude in two sentences that if EPG information is transmitted at different times of the day, it “is not available

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<sup>19</sup> *MO&O* ¶12.

<sup>20</sup> In the interactive television context, the Commission has recognized that interactive triggers may not always be associated with a specific video signal. See *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, Notice of Inquiry, 16 FCC Rcd 1321, 1323 (2001).

in the VBI during the broadcast” and therefore is not program-related under *WGN*.<sup>21</sup> But that is precisely how program-related content tends to be transmitted in the digital context: in segments or bursts at different times of the day, as opposed to in a single, continuous stream. The caching capabilities of digital technologies allow bits of information to be sent to set-top boxes during periods when use of the cable pipe is relatively low, to be called up by viewers and reassembled later.<sup>22</sup> Applying the Commission’s exceedingly narrow reading of *WGN* in the *MO&O* to the digital context might mean that viewers would be denied any number of program-related enhancements because broadcasters could not send information during times of the day when traffic is slow to be stored and called up later.

**3. The broadcaster intends for the program-related material to be viewed as an integral part of the main program**

With respect to the third prong of *WGN*, whether the material is an integral part of the program, the Commission in the *MO&O* again focused on the mode of transmission, parsing “the percentage of Gemstar’s VBI material that is related to the program appearing at the same time as the [EPG] update.”<sup>23</sup> Nothing in the statute directs such a narrow interpretation of what constitutes program-related material. In fact, the Commission’s obligation is explicitly *not* to limit digital technologies and capabilities by the possibilities of analog. Rather, the opposite is

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<sup>21</sup> *MO&O* ¶15.

<sup>22</sup> The *Digital Must Carry Further Notice* explains that “a digital broadcast could enable viewers to select other embedded information such as sports statistics to complement a sports broadcast or detailed financial information to complement a financial news broadcast” and asks whether such material would be “program-related.” *Digital Must Carry Further Notice*, 16 FCC Rcd at 2651. There should be no question that sports statistics that complement a sports broadcast or financial information that provides more detail in relation to a financial news broadcast are program-related, any more than that there is no question that multiple camera angles of a sports broadcast are, as the Commission has already determined, program-related. *See id.* at 2622. There should likewise be no question that such material is program-related regardless of whether it is transmitted with the broadcast it complements or hours earlier, so long as the viewer can call it up during the relevant broadcast.

<sup>23</sup> *MO&O* ¶18.

true: “The Commission is charged with issuing regulations and establishing standards ensuring the transition to advanced television technology.”<sup>24</sup> Applying the third prong of *WGN*, as narrowly interpreted in the *MO&O*, to digital would permanently ground consumer access to program-related material to the more limited options available in an analog world – not something that Congress intended when it directed the Commission to adapt its rules to account for the advances brought about by digital technology.<sup>25</sup> It would mean, for example, that viewers could not expect carriage of EPGs, which are essential for navigating the digital environment, unless programming information about each program were transmitted with that program rather than as part of a single, coherent guide. It would also mean that consumers could be denied access to interactive services related to their television programming, unless there were a specific link to the program being shown at that particular moment.

The interpretation of the *WGN* standard that emerges from the *MO&O* demonstrates that the test cannot be effectively adapted to apply to digital and makes it even more important for the Commission to clarify that it did not prematurely determine in the *Digital Must Carry Order* that this is the case. Reliance on the *WGN* case was never the optimal, and certainly not a necessary, way for the Commission to implement the statutory program-related provision.<sup>26</sup> The Commission should now recognize the limitations inherent in the *WGN* standard, which if applied in the digital context would stifle nascent digital and interactive technologies, and abandon it.

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<sup>24</sup> *In re WHDT-DT, Channel 59, Stuart, Florida; Petition for Declaratory Ruling that Digital Broadcast Stations Have Mandatory Carriage Rights*, Memorandum Opinion and Order, 16 FCC Rcd 2692, 2698 (2001).

<sup>25</sup> See 47 U.S.C. § 534(b)(4)(B).

<sup>26</sup> After the FCC released the *Analog Must Carry Order*, NAB and others asked the Commission to reconsider its use of *WGN* for determining whether material is program-related. See, e.g., *Petition for Partial Reconsideration and Clarification of NAB in MM Docket No. 92-259*, at 2-5 (May 3, 1993) (“NAB Petition”) (objecting to the FCC’s adoption of the *WGN* standard).

In the *MO&O*, the Commission recognized that its application of *WGN* to Gemstar's analog technology was narrowly tailored to the facts of the case.<sup>27</sup> It noted in particular that its *WGN*-based program-related analysis was and should remain separate from the *Digital Carriage Further Notice*, where the FCC "has requested comments on . . . a distinct question from that presented in this proceeding".<sup>28</sup> Having sensibly declared that the *MO&O* is limited to the specific facts before the Commission, the FCC should also clarify that it has not yet determined what standard of program-relatedness will apply to material transmitted in a digital broadcast signal.<sup>29</sup> Gemstar urges the Commission to proceed to define a new standard for program-related material in the context of an appropriate forum – the *Digital Must Carry Further Notice* – without blindly adhering to an outmoded analog-based standard.

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January 18, 2002

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<sup>27</sup> See *MO&O* ¶6 ("Gemstar uses a particular *analog* technology and video channels for delivery of its EPG material and the record in this proceeding is limited to those facts.") (emphasis added); *id.* ¶32 ("[O]ur decision today is limited to the facts before the Commission as presented by the petitions of Time Warner and Gemstar and the record compiled herein.").

<sup>28</sup> *Id.* ¶5 (footnote omitted).

<sup>29</sup> The purpose of releasing the *Digital Must Carry Further Notice* was presumably to address precisely this issue and to develop a record in accordance with the Commission's obligation to adapt its rules to take into account the technical differences between analog and digital transmissions. See 47 U.S.C. § 534(b)(4)(B).